No. 94-1471 (2)

In The

Supreme Court of the United States

October Term, 1994

VARITY CORPORATION,

Petitioner,

v.

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Employee Retirement Income Security Act ("ERISA") § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988), permit individual ERISA plan participants and beneficiaries to recover on their own behalf for breaches of fiduciary duty under ERISA?

2. Does ERISA § 404(a), 29 U.S.C. § 1104(a) (1988 and Supp. 1993), impose a duty upon plan fiduciaries not to make affirmative misrepresentations to plan participants and beneficiaries?

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BRIEF IN OPPOSITION

To the Honorable Supreme Court:

The Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari submitted by petitioner Varity Corporation.

STATEMENT OF THE CASE

This case arises from a fraudulent scheme ironically named "Project Sunshine" which was designed, in part, to rid petitioner of the obligation to pay benefits to retirees and employees of Massey Ferguson, Inc. ("MF"). (5a) As a part of the scheme, and in order to induce respondents to cooperate, petitioner[1] acting in its fiduciary capacity made various material misrepresentations to respondents[2] relating to their employee benefits. Respondents relied upon petitioner's material misrepresentations and, as a result, lost their benefits. (4a-5a)

The purpose of this action was to seek restoration of the benefits lost through Project Sunshine. The district court ultimately entered judgment for respondents directing that benefits be restored on three independent grounds of recovery under ERISA: breach of fiduciary duty, interference with protected rights and estoppel. The court of appeals affirmed, with some modification of the

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[1] Defendants in the proceedings below were petitioner Varity Corporation and its subsidiary, MF. The fraudulent scheme known as Project Sunshine related to the creation by Varity and MF of a new entity known as Massey Combines Corporation ("MCC"). The district court found that "MCC was a sham from the start" and that Varity and MF were the alter egos of MCC. (80a-89a) The district court found, and the court of appeals affirmed, that both defendants were liable for the material misrepresentations made to employees and retirees of MF. (4a-5a) Because MF has evidently now been merged into Varity, references to "petitioner" throughout this brief are intended to refer to both of the defendants in the proceedings below.

[2] The misrepresentations were made to all but ten of the respondents; those ten individuals recovered on a different theory. *See* note 5, *infra*.

remedy. In so doing, the court addressed only the theory of breach of fiduciary duty, and found it unnecessary to discuss the alternative bases of relief. (17a-18a, n. 5)

Although this case was originally tried to a jury, the district court entered its own findings of fact and conclusions of law. The court of appeals characterized the findings and conclusions as "painstaking and comprehensive." (7a) Petitioner does not contend that any of the district court's findings of fact are clearly erroneous. Accordingly, as the court of appeals noted (2a), it is appropriate to use those findings as a predicate for these proceedings.

The findings are set forth at pages 50a-80a of the appendix and need not be repeated in detail here. Contrary to the implication of petitioner's statement of the case, however, the district court found and the court of appeals affirmed that petitioner – acting in its fiduciary capacity – had not only failed to disclose to respondents material facts relating to their employee benefits, but had made affirmative misrepresentations upon which respondents relied to their detriment. (4a-5a; 62a-65a)

The district court also found, and the court of appeals affirmed (16a-17a), that petitioner's conduct in designing and implementing its fraudulent scheme:

> was willful, wanton, malicious, and in bad faith vis-a-vis all plaintiffs.
>
> * * *
>
> Project Sunshine was nothing more than a brilliant manipulative effort to sever retiree welfare obligations which had become a burdensome load on a financially strapped company. Project Sunshine was a sucker punch on loyal

employees who had given a lifetime of service to a company . . . . ERISA was enacted to prevent just such a maneuver as was undertaken in Project Sunshine.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' HOLDING THAT RESPONDENTS CAN OBTAIN INDIVIDUAL RECOVERY FOR BREACH OF FIDUCIARY DUTY DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT, AND IS THE PROPER RULING ON THE MERITS OF THAT ISSUE.

Petitioner's argument that the writ should be granted in this case is heavily founded on its contention that the decision below, holding that respondents can obtain individual recovery under ERISA § 502(a)(3) (29 U.S.C. § 1132(a)(3)) for breach of fiduciary duty, conflicts with the decisions of this Court in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), and *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993). However, neither *Russell* nor *Mertens* addressed the issue which was before the court of appeals.

Russell held that recovery under ERISA §§ 409 and 502(a)(2) (29 U.S.C. §§ 1109 and 1132(a)(2)) may inure only to the benefit of the plan itself and not to the benefit of individual participants or beneficiaries. The plaintiffs in *Russell* expressly disclaimed reliance on the statute respondents relied on here – ERISA § 502(a)(3) – and the Russell court did not address the question presented in this case.

Mertens addressed only the question of the form of relief available under § 502(a)(3) – a question petitioner does not raise in its petition here – and, like *Russell*, did not address the issue of individual recovery for breach of fiduciary duty. In short, there simply is no merit to petitioner's argument that the decision below conflicts with the holdings of *Russell*, *Mertens* or any other decision of this Court.

Although there may not be complete uniformity among the circuits, the Eighth Circuit's decision is in accord with most of the circuits which have addressed the issue presented in this case. Petitioner correctly identifies the Third and Seventh Circuits as also having expressly held that there is an individual right of recovery for breach of fiduciary duty under § 502(a)(3). *See Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986, 992-93 (7th Cir. 1993); *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1298-99 (3d Cir. 1993). In addition, decisions from both the Sixth Circuit and the D.C. Circuit have implicitly recognized an individual right of recovery. *See Warren v. Society National Bank*, 905 F.2d 975 (6th Cir. 1990), *cert. denied*, 500 U.S. 952 (1991);[3] *Eddy v. Colonial Life Insurance Co.*, 919 F.2d 747 (D.C. Cir. 1990).

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[3] In *Tregoning v. American Community Mutual Insurance Co.*, 12 F.3d 79 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1832 (1994), and *Tassinare v. American National Insurance Co.*, 32 F.3d 220 (6th Cir. 1994), the Sixth Circuit indicated that no individual right of recovery for breach of fiduciary duty would be recognized. In both cases, however, the court (like this Court in *Russell*) addressed only a claim under ERISA § 409 (29 U.S.C. § 1109) and not a claim under § 502(a)(3) and § 404.

Petitioner claims support for its position in the Eleventh Circuit's opinion in *Simmons v. Southern Bell Telephone and Telegraph Co.*, 940 F.2d 614 (11th Cir. 1991). That case, however, held only that no individual right of recovery for breach of fiduciary duty exists under ERISA § 502(a)(1)(b) (29 U.S.C. § 1132(a)(1)(b)). The *Simmons* court did not address the question of whether an individual may recover under § 502(a)(3) for a violation of ERISA § 404 (29 U.S.C. § 1104).

Among the courts of appeals which have directly addressed the question, only the Ninth Circuit has held that no right of individual recovery exists under § 502(a)(3).

Contrary to petitioner's argument, it was not necessary for the courts which have recognized a right of individual recovery under § 502(a)(3) to infer or read into the statute any remedy not expressly stated. Those courts have merely engaged in a straightforward and literal reading of the law. ERISA § 502(a)(3) provides, in pertinent part, that an individual beneficiary may bring an action thereunder "to enjoin any act or practice which violates this subchapter . . . or to obtain other appropriate equitable relief to redress such violations or to enforce any provisions of this subchapter." The provision of ERISA which imposes specified duties upon plan fiduciaries (ERISA § 404) is a part of subchapter I of ERISA, to which § 502(a)(3) refers. Respondents here sought only to obtain appropriate relief for a violation of ERISA § 404. As the court of appeals noted, "the plain language of the statute certainly favors" the recognition of such a cause of action for individual recovery. (14a-15a)

This Court has repeatedly noted that ERISA incorporates a carefully crafted scheme of remedies. *See, e.g., Russell, supra,* 473 U.S. at 146-47. Just as a court should be chary of reading into the statutory enforcement scheme remedies not expressly provided for, *id.*, so also should it take care not to read out of the enforcement scheme a cause of action which is evident from the plain language of the statute.

The decision below reflected the proper respect for the carefully crafted enforcement mechanisms of ERISA, and represents the proper resolution of the issue at hand. The issuance of the writ to address this issue is therefore unwarranted.

II.

THE DECISION BELOW, IN RECOGNIZING A FIDUCIARY DUTY NOT TO MAKE MATERIAL MISREPRESENTATIONS, DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS OR OF THIS COURT.

Petitioner's second argument in favor of the writ is that the decision below imposes "new" duties upon ERISA fiduciaries,[4] and in so doing conflicts with the decisions of other courts of appeals and of this Court. This contention is wrong on all counts.

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[4] Petitioner has not challenged the finding that it was a fiduciary to the MF plan (78a-79a) either in the proceedings below or in its petition here. Petitioner's challenge relates instead only to the finding that it was acting in its fiduciary capacity when it made the misrepresentations in question.

It must be noted at the outset that petitioner has taken great care to characterize this case as one involving only the failure to disclose material facts; however, as noted above, this case involves not merely a failure to disclose but the making of affirmative material misrepresentations. The decisions of the various courts of appeals now appear to be uniform even as to the existence of a duty to disclose, but they are even more clearly in harmony as to the existence of a duty not to make affirmative material misrepresentations.[5]

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[5] Petitioner's argument implies that all respondents relied on the same misrepresentation theory as the basis of their recovery for breach of fiduciary duty. In fact, there is a group of ten individual respondents which relied upon a different theory. These ten had retired from MF before MCC was created. While petitioner made various misleading communications to the other respondents in order to induce their consent to the transfer of their employment and benefit rights to MCC, no such representations were made to the ten individual respondents. Rather, petitioner unilaterally purported to assign to MCC its obligation to pay benefits to the individual respondents. The individual respondents were not aware of this purported assignment until MCC went into receivership and they stopped receiving benefits. (17a; 65a) The court of appeals affirmed the breach of fiduciary duty recovery for the individual respondents on the ground that an obligor "cannot free itself of contractually created duties without the consent of the persons to whom it is obligated." (17a) The court found that petitioner's failure to inform the ten individual respondents of their "transfer" to MCC or to obtain their consent constituted "a complete disregard of the rights and interests" of the individual respondents and "a clear breach of fiduciary duty in violation of section 1104(a)(1)." *Id.* The question presented by petitioner with respect to the misrepresentation theory of breach of fiduciary duty thus has no bearing on the theory of breach of fiduciary duty on which the ten individual respondents recovered.

Petitioner correctly identifies the First, Second, Sixth and D.C. Circuits – in addition to the Eighth Circuit – as having held that it is a breach of fiduciary duty under ERISA to mislead beneficiaries about their benefits or impending actions which may affect their benefits. *See Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988); *Eddy v. Colonial Life Insurance Co.*, 919 F.2d 747 (D.C. Cir. 1990); *Vartanian v. Monsanto Co.*, 14 F.3d 697 (1st Cir. 1994); *Mullins v. Pfizer, Inc.*, 23 F.3d 663 (2d Cir. 1994). In addition, the Eleventh Circuit has so held. *See Local Union 2134, United Mine Workers of America v. Powhatan Fuel, Inc.*, 828 F.2d 710, 713 (11th Cir. 1987); *cf. Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir.), *cert. denied*, 502 U.S. 938 (1991).

Petitioner's contention that a contrary rule prevails in the Third, Fifth, Seventh and Ninth Circuits is in error.

In *Blaw Knox Retirement Income Plan v. White Consolidated Industries, Inc.*, 998 F.2d 1185 (3d Cir. 1993), the Court of Appeals for the Third Circuit held that the defendant, which acted in the dual capacity of employer and plan fiduciary, did not violate its fiduciary duties in connection with the decision to sell unprofitable subsidiaries. However, *Blaw Knox*, unlike the present case and the other authorities cited above, is not a "misleading communication" case at all; the plaintiffs in *Blaw Knox* sought to predicate liability on the underlying business decision itself, not on misleading fiduciary communications regarding its effects on employee benefits.

Much more on point are the Third Circuit's decisions in *Fischer v. Philadelphia Electric Co.*, 994 F.2d 130 (3d Cir.), *cert. denied*, 114 S. Ct. 622 (1993), and *Bixler v. Central*

Pennsylvania Teamsters Health & Welfare Fund, 12 F.3d 1292 (3d Cir. 1993). In *Fischer*, the court expressly held that a fiduciary has a duty not to make affirmative misrepresentations. 994 F.2d at 134-35 ("Put simply, when a plan administrator speaks, it must speak truthfully"). In *Bixler*, the court went further and held that a fiduciary is "under a duty to communicate to the beneficiary material facts affecting the interests of the beneficiary," which entails "not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." 12 F.3d at 1300. The prevailing rule in the Third Circuit is, therefore, not in conflict but in accord with the holding of the decision below with regard to the existence of a fiduciary duty not to mislead.

Petitioner also contends that *Young v. Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988), reflects a rule in the Seventh Circuit in conflict with the decision below. The court in *Young* held that the employer/fiduciary did not breach a fiduciary duty by failing to reveal to its employees its intention to create a special severance plan. 849 F.2d at 1045. However, *Young* appears to be an isolated aberration relative to Seventh Circuit authority handed down both before and after it was decided.

In *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Insurance Co.*, 698 F.2d 320 (7th Cir. 1983), the plaintiffs sought to recover for breach of fiduciary duty by an insurance company which allegedly made material misrepresentations and omissions regarding annuity contracts it sold to, and administered for, an ERISA plan. The court stated that "there is little doubt that if Penn Mutual

was a fiduciary, the alleged misrepresentations and omissions were breaches of its fiduciary obligations. Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1)." 698 F.2d at 326.

More recently, in *Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986 (7th Cir. 1993), the court expressly held that "fiduciaries breach their duties of loyalty and care if they mislead plan participants or misrepresent the terms or administration of a plan"; that "fiduciaries must also communicate material facts affecting the interests of beneficiaries"; and that "this duty exists when a beneficiary asks for information, and even when he or she does not." 3 F.3d at 991. The *Young* decision notwithstanding, the prevailing rule in the Seventh Circuit is also in accord with the rule applied in the decision below.

The other decisions which petitioner cites as conflicting authority from two other circuits are plainly distinguishable. In *Lea v. Republic Airlines, Inc.*, 903 F.2d 624 (9th Cir. 1990), the plaintiffs alleged that their former employer and their union breached fiduciary duties under ERISA in connection with negotiations to terminate an ERISA plan. It is not clear from the opinion whether the plaintiffs' breach of fiduciary duty claim was based on misleading communications, as such. In any event, the district court granted summary judgment on the fiduciary duty claim based on a finding that neither the employer nor the union were acting as fiduciaries during the negotiations. The Court of Appeals for the Ninth Circuit affirmed the grant of summary judgment on the same basis without ever reaching the question of the

nature and extent of the duties of an ERISA fiduciary. Thus, the Ninth Circuit has simply not spoken to the issue at hand.

In *Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), employees of a merged corporation alleged, *inter alia*, that the corporation breached its duty of loyalty under ERISA § 404(a) by making misrepresentations about how assets of the pension plans of the merging corporations would be handled if the two plans were combined. The district court rejected the breach of fiduciary duty claim, holding that it "did not arise out of an ERISA plan" because the representations in question did not purport to constitute part of the written plan itself or a plan amendment. 36 F.3d at 1323. The Court of Appeals for the Fifth Circuit affirmed on that basis, again without directly addressing the question of the nature and extent of an ERISA fiduciary's duties. In addition, the court noted that the district court found – and the plaintiffs did not dispute – that the plaintiffs had failed to establish detrimental reliance on the alleged representations in any event. Thus, the *Borst* decision also does not constitute authority in direct conflict with the decision below.

The decisions reviewed above demonstrate that, in point of fact, the prevailing rule in each circuit which has directly addressed the question is that the fiduciary duties imposed by ERISA include a duty not to provide misleading information to plan participants. Under all of those authorities, when a fiduciary elects to communicate information to beneficiaries – whether or not it is obligated to communicate in the first instance – it must communicate complete and accurate material information.

The source of this duty within ERISA is not some "vague policy concern" as petitioner contends, but rather the plain language of ERISA § 404(a)(1) (29 U.S.C. § 1104(a)(1)). The statute provides, in pertinent part, that "a fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries" and shall do so "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims." These duties of loyalty and prudence are perhaps the most fundamental obligations a fiduciary may possess in any context.

Petitioner's suggestion that the recognition of an ERISA fiduciary's duty not to lie to plan participants is inconsistent with the decisions of this Court is remarkable for two reasons. First, *Russell* and *Mertens* – the two decisions to which petitioner refers – again simply do not address the question at hand. Second, if as petitioner suggests *Russell* and *Mertens* generally stand for the proposition that in addressing issues of fiduciary duty and liability under ERISA, "courts are strictly limited to enforcing what the text of ERISA *says*" (petition at p. 19), respondents cannot imagine what would represent a more straightforward and strict enforcement of the provision imposing the duties of loyalty and prudence than one which holds that a fiduciary cannot lie to plan beneficiaries. The district court found, the court of appeals affirmed, and petitioner has not disputed on appeal, that this is exactly what petitioner did in the present case. Accordingly, this issue in no respect warrants the granting of the writ.

III.

THE JUDGMENT IS SUPPORTED ON GROUNDS INDEPENDENT OF THE ISSUES RAISED BY THE PETITION.

The court of appeals found it unnecessary to address the theories of interference with protected rights and estoppel, which were independent grounds for the judgment. (17a-18a, n. 5) The district court's entry of judgment on these theories was, however, proper under the facts as found by the district court (which were not challenged on appeal) and the applicable law. The factual and legal bases for the entry of judgment on the theories of interference with protected rights and estoppel are set forth at pp. 38a-41a and 100a-112a of the appendix and will not be restated here.

The issuance of the writ is unwarranted because, even if any of petitioner's arguments with respect to the breach of fiduciary duty theory had merit, the judgment would nevertheless be sustainable on the independent theories of interference with protected rights and estoppel.

CONCLUSION

The decision below does not conflict with any decision of this Court. It does not present any genuine conflict among the circuits on any issue warranting review by this Court, and it represents a proper resolution of the issues presented with appropriate obedience to the language and purpose of ERISA. For all of the foregoing

reasons, respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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